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No. 90-9

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

MCI COMMUNICATIONS CORPORATION, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, CONSUMER FEDERATION OF AMERICA, ENHANCED SERVICES COUNCIL, ALARM INDUSTRY COMMUNICATIONS COMMITTEE, ADAPSO, THE COMPUTER SOFTWARE AND SERVICES INDUSTRY ASSOCIATION, INC., INDEPENDENT DATA COMMUNICATIONS MANUFACTURERS ASSOCIATION, INC., TANDY CORPORATION, PHONE PROGRAMS, INC., OHIO CONSUMERS' COUNSEL, NATIONAL TELECOMMUNICATIONS NETWORK, MARYLAND PEOPLE'S COUNSEL, RADIOFONE, INC., AD HOC TELECOMMUNICATIONS USERS COMMITTEE, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

v.

UNITED STATES OF AMERICA, BELL ATLANTIC CORPORATION, AMERITECH, NYNEX CORPORATION, SOUTHWESTERN BELL CORPORATION, BELLSOUTH CORPORATION, PACIFIC TELESIS GROUP, U S WEST, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT REGIONAL BELL OPERATING COMPANIES

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September 7, 1990

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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RULE 29.1 STATEMENT

Respondent Regional Bell Operating Companies ("BOCs") are publicly held corporations principally in the business of providing communications services and products to the general public. They have no parent companies. Their nonwholly owned subsidiaries are listed below.

Ameritech. Respondent American Information Technologies Corporation ("Ameritech") has no nonwholly owned subsidiaries.

Bell Atlantic. Respondent Bell Atlantic Corporation has two nonwholly owned subsidiaries: Bell Atlantic Directory Graphics, Inc., and Bell Atlantic Systems Integration Corp.

BellSouth. Respondent BellSouth Corporation has no nonwholly owned subsidiaries.

NYNEX. Respondent NYNEX Corporation has no nonwholly owned subsidiaries.

Pacific Telesis. Respondent Pacific Telesis Group has no nonwholly owned subsidiaries.

Southwestern Bell. Respondent Southwestern Bell Corporation has one nonwholly owned subsidiary: Aurec Cable TV (1988) Ltd.

U S West. Respondent U S West, Inc., has one nonwholly owned subsidiary: U S West NewVector Group, Inc.

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STATEMENT OF THE CASE

This case concerns a narrow dispute over the standards for removing the information services restriction in the consent decree that ended the *AT&T* antitrust litigation.

That restriction rested solely on the parties' election to include it. As the court of appeals observed, "[t]he Government's case in the *AT&T* antitrust litigation centered exclusively on AT&T's activities in the interexchange-service and equipment-manufacturing markets"; there were no allegations, or evidence presented, of anticompetitive activity in the information services market. 900 F.2d at 307; App. 52a. ("App." denotes Appendix to Petition.) The information services restriction was inserted into the decree by the parties purely "as a precautionary measure in light of uncertainty about how divestiture of AT&T would affect the development of this embryonic market." *Id.* "Under these circumstances," the court of appeals held, the information services restriction was not required to be in the decree in the first place — i.e., "it would not have been legal error for the district court to approve the decree had the parties *not* agreed on their own to include the restriction on information services." *Id.* (emphasis in original).

The parties also agreed, in May 1982, to specific standards governing motions to remove the various line-of-business restrictions from the decree. As to motions *uncontested* by the decree parties, the parties expressly indicated their acceptance of the traditional common law standard, which requires approval of a decree modification so long as it falls within the broad reaches of the public interest. *See* 900 F.2d at 306; App. 50a (" '[i]n the event that the parties agree to an amendment of the modification to remove [a line-of-business] restriction, the standard for such removal would be whether it is in the public interest' ") (quoting brief of the United States; also citing AT&T brief to same effect).

As to *contested* motions to modify the decree, in their filings the parties indicated their willingness to accept a variant of the traditional common law rule of *United States* v. *Swift & Co.*, 286 U.S. 106, 118-19 (1932), under which relief would be granted "upon a finding 'that "the rationale for [the restric-

tion] is outmoded by technical developments,"'" even if such developments were foreseeable. 900 F.2d at 306; App. 50a (quoting 552 F. Supp. at 195 (quoting government brief)). But in August 1982, in its review of the proposed decree, the district court rejected this *Swift* approach. It observed that this standard "incorporates the Department of Justice's view that the restrictions are justified by the mere existence of monopoly power," *United States* v. *AT&T*, 552 F. Supp. 131, 195 (D.D.C. 1982), *aff'd mem. sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983), a view that the district court had earlier rejected as overly simplistic and potentially anti-competitive. *Id.* at 187. Explaining that use of this *Swift* standard could "limit competition by preventing the entry of a viable competitor," *id.* at 195 n.264, the district court "conditioned approval of the decree on adoption of section VIII(C)," its own proposed addition, "in order to alter the parties' stated intention" concerning contested motions. 900 F.2d at 306; App. 50a. Section VIII(C) requires that a restriction "shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter."

Nowhere in its August 1982 opinion did the district court state that it was displacing the parties' explicit May 1982 agreement that the public interest standard would govern *uncontested* motions to modify the decree, where no party objected to the removal of a restriction. Since 1982, all of the parties to the decree — the government, AT&T, and the BOCs — have stated their understanding that Section VIII(C) is an additional standard for removal of the restrictions, one that supplements the common law standards agreed to by the parties from the beginning.[1]

[1] For example, then-Asst. Attorney General Douglas H. Ginsburg stated in a letter to Rep. John D. Dingell, dated Oct. 2, 1986, at 39, that "the line of business restrictions could be removed pursuant *either* to a motion for a waiver under Section VIII(C) *or* to a request for modification in accordance with the

In line with this agreement, in the 1987 Triennial Review proceedings in the district court the "BOC petitions regarding information services," which were uncontested, rested on the public interest standard, whereas BOC petitions to remove the other restrictions, which were contested, rested on Section VIII(C). 900 F.2d at 294; App. 24a-25a.[2] In addition to the evidence presented by the BOCs, the Department of Justice introduced substantial evidence supporting its view that entry of the BOCs into the information services market would not pose anticompetitive dangers, and that the current ban deprives consumers of substantial benefits.[3]

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standards for modifying antitrust decrees," Ct.App.J.A. 1004 (emphasis added). AT&T stated in its brief below that "Section VII of the Decree continues to permit modification of the Decree's provisions if the 'common law' standards of decree modification are satisfied." Brief of AT&T in the court of appeals, filed July 25, 1989, at 17 n.17. The BOCs, of course, argued the Section VII public interest standard both in the district court and in the court of appeals.

[2] Petitioners observe that in the BOCs' initial motions for removal of the information services restriction — filed when it was not yet clear whether information services relief would be contested — the BOCs invoked Section VIII(C). (Pet. 10 & n.17). Nothing in those filings prevented the BOCs from later invoking the public interest standard, as was done once it became clear that no party to the decree opposed relief. Ct.App.J.A. 2213-14 (BellSouth's Response to Comments). The district court in no way suggested that the public interest standard had somehow been waived; rather, it expressly ruled that the public interest standard was not available under the decree. The court of appeals held that the standard was properly invoked, and that the district court erred in failing to apply it.

[3] As noted *supra* p. 2, the information services restriction, when agreed to in 1982, was not based on proof of BOC anticompetitive conduct or on any in-depth analysis of the information services market. After completing its first comprehensive analysis of the market in 1987, the Department urged lifting of the information services restriction, noting the large size of many competitors and the increasing globalization of the information services market, and concluding that there was no realistic prospect that the BOCs would obtain market power if allowed to enter that market. Report and Recommendations of the United States, filed Feb. 2, 1987 (Ct.App.J.A. 1006-1221), at 111-29. The Department also pointed out that various regulatory protections "should mitigate, even if they do not completely eliminate," the risks of anticompetitive behavior. *Id.* at 133.

The district court, in its 1987 ruling, rejected the BOCs' invocation of the public interest standard. The district judge explained that he was in an unusually "advantageous position" to resolve this issue, given his experience with the case and the fact that he "was the author of section VIII(C)," 673 F. Supp. at 533 n.24; App. 120a-121a n.24, and he ruled that Section VIII(C) is to govern all requests to lift restrictions, whether contested or uncontested.[4] Nowhere did he refer to the parties' explicit May 1982 endorsement of the public interest test, or explain exactly how the decree or his August 1982 opinion could be read as having displaced that agreement with a rule that the Section VIII(C) test would govern *all* motions. Nonetheless, applying Section VIII(C), the district court denied information services relief on the basis that the BOCs had failed to carry their burden under that test.[5]

In representing consumer interests, the Department also explained that:

> [W]hile it was assumed at the time the decree was entered that a general prohibition on BOC provision of information services would not deprive the public of access to various types of information services or significant efficiencies, this assumption has been disproved by subsequent developments.
>
> * * *
>
> Consumers have been deprived of some services already, and the potential that efficiency will be sacrificed or that services made possible by new technical developments will be unavailable to BOC customers is likely to be even greater in the future.

Id. at 153-54. The Department stressed that information services restrictions impose particularly heavy costs on "residential consumers generally, . . . the elderly and handicapped, [and] small and large entrepreneurs," Response of the United States, filed Apr. 27, 1987 (Ct. App. J.A. 2319-2341B), at 69-70.

The Department's August 1990 conclusions in the ongoing remand proceeding reaffirm these 1987 findings. See *infra* note 17.

[4] 673 F. Supp. at 532-35 & nn.22, 24, 26, 34 & 35; App. 119a-125a & nn. 22, 24, 26, 34 & 35.

[5] 673 F. Supp. at 562-67; App. 184a-195a. The district court did lift the information services restriction with respect to certain limited functions involving the transmission of information, and "gateway" services, but not the generation or manipulation of content. *See* 673 F. Supp. at 587-97; App. 238a-260a, and *United States* v. *Western Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988); App. 62a.

In the court of appeals, no party to the decree defended the district court's failure to apply the public interest standard. Various nonparties, however, which had been granted limited intervention status by the district court, argued that Section VIII(C) was the exclusive standard. The court of appeals, in a unanimous *per curiam* opinion (by Edwards, Mikva and Silberman, JJ.), rejected these arguments.

In resolving this dispute, the court of appeals relied on the conventional tools of language and context set down by this Court in cases like *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), and *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975), for the interpretation of consent decrees. *See* 900 F.2d at 293; App. 22a-23a. It accepted as its starting point a proposition that petitioners nowhere question: "a less demanding standard of review applies to an uncontested motion to modify a consent decree than applies to a contested one," so that "unless the parties have expressly agreed otherwise . . . when all parties to a decree assent to a particular modification, the relevant inquiry for the court is whether the resulting array of rights and liabilities comports with the 'public interest.' " 900 F.2d at 305; App. 47a-48a (citations omitted).

The court's question, therefore, was whether the parties had "expressly agreed otherwise." Examining the text of what petitioners insist is the definitive term of the decree, Section VIII(C), the court was unable to find any intention to depart from the "public interest" standard that ordinarily applies to uncontested modifications. Section VIII(C) simply guarantees that line-of-business restrictions "shall be removed upon a showing by the petitioning BOC" of particular market facts; as the court below observed, "Section VIII(C) does not purport to be the *exclusive* standard for reviewing motions to modify restrictions," 900 F.2d at 306; App. 49a (emphasis in original). It concluded that, "[a]t best, section VIII(C) must be deemed to be silent on the question of what standard applies to uncontested motions," *id.*

Moreover, as the court of appeals observed, given the context in which Section VIII(C) was added to the decree, its reference to "petitioning BOC" appeared to contemplate BOC motions for removal where relief was *contested* by a party. Looking to "[t]he circumstances surrounding the formation of the decree," and citing the parties' May 1982 filings with the district court, the court concluded that these "leave little question that the parties expected uncontested motions to be governed by common law principles pursuant to section VII." 900 F.2d at 306; App. 50a. The court further observed that "[t]he addition of section VIII(C) cannot be viewed as altering this understanding." *Id.*

The intervenors who addressed this issue argued, quoting a sentence in the *text* of page 195 of the district court's August 1982 opinion, that "Section VIII(C) was designed, and incorporated into the decree, specifically to 'avoid any question about the appropriate test.'" Joint Brief of Electronic Publishing Participants, filed July 25, 1989, at 10 (quoting 552 F. Supp. at 195). The court of appeals responded by quoting *the footnote to this district court statement* that appears immediately after the words "appropriate test," indicating *which* test the district court wished to "avoid any question about." It observed: "The trial court expressly noted that the standard in section VIII(C) would supplant '[t]he test usually applied to a *contested* modification . . . [as] set forth in *United States* v. *Swift & Co.*'" 900 F.2d at 306; App. 50a (court of appeals' emphasis) (citation omitted) (quoting 552 F. Supp. at 195 n.266).[6]

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[6] In response to the Electronic Publishing Participants' brief, the BOCs had pointed out that the district court's statement in text "in no way suggests that section VIII(C) was to become the exclusive test for decree modifications," because "[t]he footnote to this comment makes clear the context . . . ." Reply Brief of the Bell Company Appellants Regarding Information Services, filed Sept. 20, 1989, at 14 n.9 (quoting footnote 266). In choosing to read the text of page 195 in light of the accompanying footnote, the court of appeals not surprisingly decided that the BOCs' argument on this point was the more persuasive one.

It was thus quite clear to the court of appeals that "[n]othing in the [district] court's [contemporaneous August 1982] opinion suggests that section VIII(C) was designed in addition to displace the parties' agreement that a public interest standard would apply to *uncontested* motions to modify" the line-of-business restrictions. 900 F.2d at 306-07; App. 50a (emphasis in original).

After concluding that the district court erred in applying the Section VIII(C) standard to an uncontested motion to lift the information services restriction, the court of appeals directed a remand for application of the public interest test. The district court promptly set a briefing schedule under which those favoring information services relief filed by August 22, 1990, responses are due by October 3, 1990, and replies are due by November 21, 1990.

Although the actual parties to the decree do not disagree with the court of appeals' interpretation of the decree, petitioners — principally, businesses currently operating in the information services market, and their trade groups, who are opposed to competition from the BOCs — have sought review in this Court on the basis of their status as limited intervenors below. Despite the pendency of the remand and its expeditious scheduling, petitioners seek review of the case now, arguing that the court of appeals departed from the proper standards of decree construction and of appellate review, and that extraordinary circumstances exist requiring immediate intervention by this Court.

REASONS FOR DENYING THE WRIT

Introduction

There is no reason whatever for this Court to review the decision below.

The decision at issue is a narrow one, interpreting a single consent decree by employing conventional tools of construction. The analysis is tightly fact-bound, turning heavily on the wording of one section of the decree, the particulars of the parties' May 1982 filings in the district court, and detailed examinations of the text and a footnote on a page of the district court's contemporaneous opinion. There is nothing to distinguish the opinion below from the run-of-the-mill case where participants dispute the meaning of decree provisions, a court applies standard rules of construction, and some participants (here, limited intervenors, not parties) continue to insist that error has been committed. The case therefore raises no issues of general interest.[7] The attempt to suggest otherwise rests solely on distortions of the opinion below and of decisions by other circuit courts and this Court.

Moreover, even if the two questions put by petitioners were presented by this case, there would be no basis for the assertion that the circumstances merit review by this Court *now*, for the court of appeals has simply remanded the case to the district court for application of what it regards as the proper standard for uncontested modifications of this particular consent decree. No emergency potentially worthy of this Court's immediate attention exists. The information services restriction, which

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[7] Contrast *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 225-26 n.1 (1975) (involving a consent decree term raising issues common to dozens of FTC antitrust decrees).

was not a necessary part of the decree in the first place, will nonetheless remain in place at least until the district court acts. If indeed relief from the restriction is granted, and this affects petitioners in a tangible manner raising a genuine stake in the outcome, this Court will be free to address these and any other issues on a full record. Review at this time would merely interrupt a remand process which is already well under way.

Argument

1. *The first "Question" is not actually presented.*

The first "Question Presented" asks whether the court below erred in supposedly rewriting the decree — "in replacing express language in the AT&T consent decree with its own 'flexible' test for removal" of the restrictions. Pet. i.

Clearly, however, no such question is actually presented. The court below merely applied standard tools of construction to determine that the *parties* had manifestly embraced the traditional public interest test for uncontested consent decree modifications.

The established meaning of the public interest test is clear: it "directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*." 900 F.2d at 307; App. 51a (emphasis in original). The court of appeals cited ample authority on this point, *see* 900 F.2d at 305-06, 309; App. 47a-49a, 55a, and petitioners nowhere suggest the test is unsettled.[8]

[8] Petitioners do seize on the court of appeals' well-supported admonition that the district court "bear in mind the *flexibility* of the public interest inquiry" in

In effect, therefore, petitioners ask this Court to review a lower court opinion that was never written. In that phantom opinion, the court of appeals apparently rubs out express language making Section VIII(C) the exclusive standard, and substitutes its own test. This is hardly responsible advocacy: it turns the opinion below upside down in the effort to create a question where none exists. Far from replacing express decree language with its own view of the proper standard, the court below was, in truth, searching for an express statement that might displace the general rule that a public interest test applies to uncontested modifications. But it found that "the only *express* intention relating to section VIII(C) was that it would displace the *Swift* test for reviewing contested modifications." 900 F.2d at 307; App. 51a (emphasis in original).

The question *actually* put forth by petitioners, then, is simply whether the court below erred in the conclusions it drew using the conventional tools of consent decree construction. Yet that question is so specific to this decree that it plainly does not merit review.

Petitioners urge, contrary to the belief of all parties to the decree, and the opinion of the court of appeals, that the "normal meaning" of the decree's language is that Section VIII(C) provides the exclusive standard for decree modification. Pet. 17. Even if petitioners' quite aberrant view of the "plain language" were supportable, this argument manifestly raises no issue of general applicability.

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allowing parties to reach settlements within a broad range, 900 F.2d at 309; App. 55a (emphasis in original). With this word they suggest that the court constructed "its own indefinite and 'flexible' test," Pet. 3. They complain that the "principal characteristic" of the test is flexibility; they term it "the court of appeals' flexible test"; and they characterize the test as "newly-fashioned". Pet. 14. But despite these comments, there is no argument that the court of appeals erred in articulating the *content* of the public interest test. The asserted error is the court of appeals' disregard of the supposedly applicable "express standard" of Section VIII(C). Pet. 3.

Petitioners also stress, as they did in the court of appeals, the *text* of page 195 of the district court's August 1982 opinion discussing the "appropriate test," and attempt to minimize the force of the *footnote* that accompanies this text, on which the court of appeals relied and which indicates that the test being discussed is that governing contested modifications. Pet. 20-21 & n.34. The interpretation of the court below appears plainly correct. But even if that were less clear, such a particularized dispute — over whether a sentence fragment seized on by an intervenor should be read in isolation, or whether it should be read in light of the accompanying footnote — is obviously not of the sort worthy of review by this Court. It is difficult to think of an issue of consent decree interpretation that could turn more on the facts of the particular case.

Equally fact-specific is petitioners' suggestion that the court below "ignored six years of history that flatly contradicts" its interpretation. Pet. 18. This is said to be the case because more than 130 petitions "to waive or remove line-of-business restrictions," almost all uncontested, were reviewed by the district court under Section VIII(C), and because "each was resolved under Section VIII(C) *without any objection* to application of the Section VIII(C) standard." Pet. 19 (emphasis in original). Petitioners present a flawed picture, and tracing all their distortions would require extensive analysis of the decree history. In brief, early in that history, the district court endorsed the parties' view of the Section VII public interest standard by approving several waiver requests under it.[9] In light of this

[9] In *United States* v. *Western Elec. Co.*, 569 F. Supp. 990, 1019 (D.D.C. 1983), the district court noted that "the Court is technically being asked to modify the decree, pursuant to Section VII, to allow limited inter-LATA service by the Operating Companies," and it approved the modification "provisionally subject to reevaluation . . . ." In addressing whether the BOCs would be allowed to provide time-and-weather services notwithstanding the information services restriction, the district court observed that the prohibition could be lifted on a motion brought under either Section VII or Section VIII(C), Mem. op. of Nov.

recognition of the applicability of Section VII, the BOCs continued to cite Section VII in subsequent requests,[10] and this changed only when the district court, on July 26, 1984, decided for reasons of administrative convenience to require submission of all waiver requests to the Department of Justice for market analysis under the Section VIII(C) standard.[11]

8, 1983, at 2 (Ct.App.J.A. at 329), and subsequently concluded that "[t]he provision of this service is obviously in the public interest," and granted relief under both standards. *United States* v. *Western Elec. Co.*, 578 F. Supp. 658, 660 (D.D.C. 1983). The district court granted "a waiver pursuant to section VII of the decree to permit [the BOCs] to continue to deliver to AT&T inter-LATA sent-paid coin calls from coin telephones." Mem. op. of Feb. 6, 1984, at 10. The district court also granted New York Telephone's "motion pursuant to section VII of the decree seeking permission to provide inter-LATA non-optioned Extended Area Service (EAS) between two adjacent exchanges in upstate New York," Mem. Order of July 19, 1984, at 1.

[10] *E.g.*, Motion of Ameritech, et al., dated Dec. 8, 1983, at 1 (waiver request to provide "911" services, invoking Section VII); Motion of Pacific Telephone and Nevada Bell, filed Dec. 14, 1983, at 1 (waiver request to provide "911" services, invoking Section VII); Motion of Pacific Telephone, et al., filed Dec. 29, 1983, at 1 (request for waiver to provide foreign exchange services in California, invoking Section VII); Motion of Southwestern Bell, filed Dec. 29, 1983, at 1 (request for waiver to provide local flat-rate service along Texas-Mexico border, invoking Section VII); Motion of BellSouth, filed Dec. 30, 1983, at 1-2 (request for waiver to allow operation of intrastate WATS service, invoking Section VII); Motion of BellSouth, filed Jan. 27, 1984, at 1-2 (requesting waiver covering activities of software subsidiary, invoking Sections VII and VIII(C)); Motion of Southwestern Bell, filed Feb. 13, 1984, at 1 (requesting waiver to permit intrastate, inter-LATA "800" service, invoking Section VII); Motion of NYNEX, filed Feb. 15, 1984, at 1 (requesting waiver to provide office communications systems, invoking Sections VII and VIII(C)); Motion of BellSouth, dated Feb. 24, 1984, at 1 (requesting waiver to allow submission of bid on NASA contract, invoking Sections VII and VIII(C)); Memorandum of Southwestern Bell, filed Mar. 30, 1984, at 11 (requesting temporary waiver concerning intercarrier revenue-division arrangements, invoking Section VII).

[11] *United States* v. *Western Elec. Co.*, 592 F. Supp. 846, 873-74 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985). The district court, after receiving "a number of suggestions concerning procedures for dealing with present and future requests for waivers of the line of business restrictions," stated that "[i]n order to encourage informal negotiation and resolution, to avoid inundation of the Court with requests, and to make use of the expertise of the Department of Justice, all such requests will be initially referred to the

Nothing in this order challenged the parties' May 1982 agreement about the applicability of a public interest standard under Section VII for uncontested modifications. Nor did the district court suggest that its past orders of relief under Section VII (the most recent handed down just seven days earlier, see *supra* note 9), had somehow been in error. The fact that the district court itself thereafter chose to invoke Section VIII(C) in resolving uncontested requests to lift line-of-business restrictions, and that the district court's routine grants of uncontested requests left the BOCs with little incentive to appeal, in no way suggests error in the decision of the court of appeals below. Moreover, even if the BOCs had somehow acquiesced for a time in the use of Section VIII(C),[12] petitioners do not explain how this could override the plain language of the decree and the history of its drafting, particularly given the other parties' adherence to the test, see *supra* note 1.

2. *Nor is the second "Question" actually presented.*

The second "Question Presented" asks whether the court of appeals "failed to accord appropriate deference" to the district court's interpretation of what the decree means. Pet i. There appear to be three separate facets to this question. In petitioners' view, the court erred in taking the "extremely activist approach" of "review *de novo*," leaving "no room for deference to the interpretation of the district court," Pet. 21. On the wholly unsubstantiated theory that other circuits would have deferred to the district court here, petitioners assert that certio-

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Department of Justice"; the Department's role would be to perform a screening function by considering "formally or informally" whether the competitive showing articulated by Section VIII(C) had been made. *Id.* at 873 (citations omitted).

[12] In fact, a BOC appealed from the district court's administrative order of July 26, 1984. The appeal was dismissed on the ground that the district court's opinion "was neither a final decision nor an appealable interlocutory order." *United States* v. *Western Elec. Co.*, 777 F.2d 23, 24 (D.C. Cir. 1985).

rari should be granted "to clarify the standards appellate courts should apply" on review of consent decree cases. Pet. 21. Petitioners also suggest that the opinion below conflicts with a rule of appellate deference supposedly announced by this Court in *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959). Pet. 17, 21.

On inspection, every facet of this argument simply collapses.

First, the *de novo* review by the court of appeals of the matter of law before it *did* "accord appropriate deference" due the district court. The court of appeals took "careful account of the explanatory opinion issued by the district judge at the time the decree was entered," 900 F.2d at 294 n.10; App. 24a n.10, a factor routinely considered in any *de novo* analysis. To be sure, the court of appeals rejected the idea "that this particular district judge's interpretations should be afforded some 'special' deference because he drafted the pivotal provision of the decree, section VIII(C), and because he has had enormous experience overseeing the case and the decree since its inception." 900 F.2d at 294; App. 24a. But there is nothing unusual about declining to give special weight to the views and *post-hoc* explications of a district judge simply because of who he is, *e.g.*, 673 F. Supp. at 533 n.24; App. 120a-121a n.24. That is known as the rule of law.

Second, the statement of the court below that an approach "apparently embraced by other circuits," 900 F.2d 294; App. 24a (citing *Keith* v. *Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986)), might argue for affording special deference to this district judge does *not* "acknowledge[ ] conflict with other federal appellate courts," Pet. i, and does not itself raise an issue worthy of review. This Court " 'reviews judgments, not statements in opinions,' " *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 734 (1978) (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)). As petitioners themselves must concede, even the circuits they cite as in "conflict" routinely

employ *de novo* review on consent decree interpretation issues.[13] The opinions petitioners cite establish, at most, that where (unlike here) the language and history of a consent decree are silent on an issue, and where (unlike here) the parties themselves do not agree on a construction of the decree, greater weight should be accorded the conclusions of a district judge who has had substantial experience with a case.

For this "question" to have independent significance beyond a simple relitigation of the merits of *this* case, petitioners must establish that some other circuit reviewing an issue of consent decree interpretation, upon finding that the text and contemporaneous history clearly pointed to one interpretation (on which all parties agree), would nevertheless adopt a contrary interpretation simply because the particular district judge who drafted the language had a contrary view. It is difficult to imagine a circuit establishing this rule, and the decisions cited by petitioners provide no support for it.[14] There is simply nothing

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[13] Pet. 22 n.39 (citing *Keith* v. *Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986)). These other circuits have repeatedly applied the *de novo* standard without affording any particular deference to the views of the district judge administering the decree. *See, e.g., Jeff D.* v. *Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) (making clear that under *Keith* v. *Volpe* "[a] district court's interpretation of a consent judgment is a matter of law and freely reviewable on appeal"); *Stotts* v. *Memphis Fire Dep't*, 858 F.2d 289, 299 (6th Cir. 1988); *South* v. *Rowe*, 759 F.2d 610, 613 (7th Cir. 1985); *AMF Inc.* v. *Jewett*, 711 F.2d 1096, 1100-02 (1st Cir. 1983).

[14] For example, in *Vertex Distributing, Inc.* v. *Falcon Foam Plastics, Inc.*, 689 F.2d 885, 893 (9th Cir. 1982) (cited in Pet. 22 n.36), the district court ruled that the plain language of the decree permitted certain conduct, and that the parties had never expressed a purpose to bar the conduct; the court of appeals held that this finding "deserves deference." *See also Keith* v. *Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986) (Pet. 22) (relying on *Vertex* in a similar context). *Brown* v. *Neeb*, 644 F.2d 551, 558 & n.12 (6th Cir. 1981) (Pet. 22 n.37), merely affirmed the finding of the district court that the clear purpose of the parties required a certain interpretation of the decree where the language was silent, holding that the district judge's "views deserve deference" as a key "relevant aid[ ] to contract interpretation . . . ." *Ferrell* v. *Pierce*, 743 F.2d 454, 461 (7th Cir. 1984) (Pet. 22 n.37), followed *Brown* v. *Neeb* and observed that the views of a district judge with more than a decade of experience under

to the claim that several circuits "follow a rule contrary to that applied by the court of appeals in this case," Pet. 22. For the only "rule" in this case — once petitioners' mischaracterizations of it are set aside — is that the court of appeals will not discard its own assessment of a decree's plain meaning in blind deference even to an indisputably experienced district judge. There is thus no conflict in the circuits, and no important issue of consent decree review for this Court to resolve.[15]

Third, there is nothing to petitioners' attempt to create a conflict with *Atlantic Refining*, where this Court supposedly "held that a reviewing court should affirm the district court's interpretation of a consent decree provision" where the language and history support it, and " 'where the trial court concludes that this interpretation is in fact the one the parties intended,' " Pet. 17 (quoting *Atlantic Refining*, 360 U.S. at 24). *Atlantic Refining* established *nothing* about appellate court deference to

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a decree were " 'entitled to deference,' " *id.* at 461 (citation omitted), but there is no indication that much turned on this deference; in fact, the court observed that "our primary goal must be to discern the intent of the parties as embodied in the agreement." *Id.* *AMF, Inc.* v. *Jewett*, 711 F.2d 1096, 1102 (1st Cir. 1983) (Pet. 22 n.37), cited "the usual considerations of contract interpretation" in *rejecting* the district court's view that decree provisions were "fatally ambiguous," although it stated that "[i]n matters fairly open to debate, we have deferred to the conclusions of the district court."

[15] Petitioners further urge that this case merits review because there is a nagging "conceptual problem" in reading *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), to embrace *de novo* review of consent decree interpretation because "*Armour* did not involve the appropriate standard of review at all, and in no sense required courts of appeals to forego the obvious wisdom of deferring to the understandings of a district court familiar with the making and administration of a decree" (Pet. 22-23). But *de novo* review of consent decree interpretation has been standard at least since the decision in *Hughes* v. *United States*, 342 U.S. 353 (1952), where this Court did not believe that "obvious wisdom" required it to defer to a three-judge district court; it overturned the district court on a simple analysis of the language and history of the decree.

Petitioners' complaint about "[u]ncritical application of a *de novo* standard of review," and their closing wishes for "this Court to articulate standards of consent decree review" designed to "accommodate" the character of particular decrees; to be "sensitive to the origin and function" of the language involved; and to be "respectful" of district court efforts to administer their decrees with

district courts. The district court there rejected the government's proposal that a novel interpretation of an existing consent decree would better suit the decree's purposes. This Court simply agreed on that record "with the trial court," rejecting the government's "strained" textual argument in the face of its "long-standing acquiescence" in the decree interpretation favoring the antitrust defendant, and stating that the purposes of the applicable statutes did not "warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues." 360 U.S. at 22-23 (footnote omitted).

The *Atlantic Refining* reasoning later crystallized into the "four corners" test of *United States* v. *Armour & Co.*, 402 U.S. 673, 681-82 (1971). As this Court explained in *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975), these cases each held that "it is inappropriate to search for the 'purpose' of a consent decree and construe it on that basis" where the result is in tension with the normal reading of the language and history of the decree, and where there is no indication that both parties embraced this supposed purpose. The portions of the Court's *Atlantic Refining* opinion immediately preceding and following the surgically excised block quote on which petitioners hinge their position, Pet. 17, illustrate that *Atlantic Refining* in fact articulates a substantive rule for decree construction, not a rule of appellate review.[16]

"coherence," Pet. 24, simply offer additional window-dressing for their view that the court below erred — which is the entire focus of the second "Question Presented."

[16] The full block quotation, with the portion omitted by petitioners italicized, reads as follows:

> *We do not decide the case on any question of laches or estoppel, nor do we comment on any possible modifications of the decree which might appropriately be made under Clause X of the judgment, which continues the jurisdiction of the District Court. We merely hold that* where the language of a consent decree in its normal meaning supports an interpretation; where that interpreta-

There is thus *nothing* in the decisions of other courts of appeals, or in *Atlantic Refining*, that would remotely endorse a trial court prerogative to discount the language and history of a decree, substitute its own view of what the parties meant to do in the decree, and demand deference to that judgment on appeal.

3. *Nor do extraordinary circumstances warrant this Court's disruption of the ongoing remand.*

That the asserted error in this single case is the real basis for petitioners' plea for review is illustrated by petitioners' final concern: "Most importantly, the appellate court's ruling threatens to dislocate coherent enforcement of competitive protections that affect the daily lives of most Americans, as well as billions of dollars of annual investment in 'a vast and crucial sector of the economy.' " Pet. 4 (quoting 552 F. Supp. at 152). Petitioners intimate that the information services ban was designed "to redress persistent antitrust abuses" and that, "[t]o ensure that the remedy would endure," the decree required Section VIII(C)'s standards to be met before the ban was lifted. Pet. 3. Petitioners conclude that "review of this case [is] a

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> tion has been adhered to over many years by all the parties, including those governmental officials who drew up and administered the decree from the start; and where the trial court concludes that this interpretation is in fact the one the parties intended, *we will not reject it simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place. Accordingly, the judgment below is Affirmed.*

360 U.S. at 23-24 (footnote omitted). The omitted language makes clear that the sole focus of *Atlantic Refining* is on limiting the ability of the government, after long validating a reasonable construction of the decree which the trial court believes was embraced by both parties, to urge a contrary interpretation based on what it suddenly claims was its *real* reason for entering into the decree. This is a substantive guide for the interpretation of consent decrees generally; it has nothing to do with standards of appellate review.

matter of pressing importance" because growth in the information services market supposedly "depends on the decree's information services restriction," which petitioners claim "generated a wave of investment," Pet. 15. The Court should not defer resolution of the case, we are told, because the decision below "will alter the conduct of ongoing proceedings"; because immediate review would advance judicial economy and fairness to the parties; and because the BOCs may otherwise win on remand. Pet. 16.

First and foremost, these are not reasons for urging a grant of certiorari. Petitioners are not before a court of appeals asking for immediate, interlocutory review of an issue in advance of the normal appeal of right; they are requesting exceptional, discretionary review of supposedly important general issues of federal law. The courts of appeals render numerous opinions each year altering "the conduct of ongoing proceedings" in cases involving sizable stakes, but this Court routinely denies efforts by affected interests to interrupt remand proceedings with review of fragments of the case. *See, e.g., Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.*, 389 U.S. 327, 328 (1967). In so doing, this Court makes plain that the value of judicial economy is not to be ignored simply because much is at stake.

Second, this ground for review — that the court of appeals' supposed reinterpretation threatens to remove allegedly essential protections of the information services market and imminently to injure consumers — not only depends on detailed factual inquiry but also begs the whole question now being litigated on remand: whether dropping the information services ban is indeed within the reaches of the public interest. Given that the *AT&T* antitrust litigation has never involved any charge, much less any finding, of anticompetitive behavior in the information services market, and given that the Department of Justice now urges that lifting of the information services ban carries no

substantial risk of lessened competition and would in fact greatly benefit consumers as well as conserve vital enforcement and judicial resources for other uses,[17] the factual inquiry necessary to address this ground for certiorari would need to be extensive. Yet that is precisely the point of the remand. In any event, the information services ban will not be lifted until all relevant points are thoroughly addressed and such relief is found to be within the public interest. Thus no ground for certiorari is supplied by petitioners' economic assessment.

Third, nothing could be more unsettling to this large sector of the economy than for this Court to grant review prematurely and derail the remand proceedings that are already under way with a briefing cycle scheduled for completion this November. If anything would unsettle market behavior, it would be needless protraction of the lower court proceedings. Thus the objective for all parties ought to be rapid completion of the remand.

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[17] The Memorandum of the United States in Support of Motions For Removal of the Information Services Restriction, filed August 22, 1990, in the district court remand proceedings, reflects the results of the Department's latest assessment of its enforcement experience, market facts, the efficacy of regulation, and the views of a variety of interested persons. *Id.* at 8-9.

As to risks to competition, confirming its 1987 conclusions (see *supra* note 3), the Department explained that the "critical assumptions" about possible risks to competition that had led the parties in 1982 to include the information services restriction as a precautionary measure had "proved flawed," and that "there is no continuing justification for the information services restriction." *Id.* at 14-15.

The Department found (again confirming its 1987 conclusions) that the interests of consumers outweigh any risk. It concluded that the remaining information services ban "is itself an unnecessary bar to potentially procompetitive services," *id.* at 36; that "the BOCs' expertise in telecommunications and their large customer bases make them natural competitors in information services markets," *id.* at 37; and that BOC entry "could be especially important in promoting innovation and increasing competition," *id.* at 37.

Also outweighing any risks, the Department noted, are "the administrative and enforcement burdens of retaining the information services prohibition" which it said "are great," given the demand for "technical expertise that neither a law enforcement agency nor the judicial system normally possesses," and "[g]iven the Department's and the Court's many other responsibilities and limited resources . . . ." *Id.* at 38.

The result can in due course be addressed by this Court if a petition is then filed. If, as it seems reasonable to assume at this stage, the court of appeals' interpretation of the decree is correct, then a grant of interlocutory review now followed by an affirmance later would add a year or more of delay to the remand. The petition is an unnecessary distraction which should be promptly eliminated.

CONCLUSION

For the reasons stated, the writ of certiorari should be denied.

Respectfully submitted,

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